1979

Quayle Cannon, Jr., And Sheldon R. Brewster, On Behalf of Themselves And Other Parties Similarly Situated v. Leonard W. Mcdonald, In His Original Capacity As Executive Director of The Utah State Retirement Board, Andd The Utah State Retirement Board : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

QUAYLE CANNON, JR., and SHELDON R. BREWSTER, on behalf of themselves and other parties similarly situated,

Plaintiffs and Respondents,

-vs-

LEONARD W. McDONALD, in his original capacity as Executive Director of the Utah State Retirement Board, and the Utah State Retirement Board,

Defendants and Appellants.

BRIEF OF APPELLANTS

APPEAL FROM A JUDGMENT OF THE [illegible]

OF SALT LAKE COUNTY

THE HONORABLE JAMES S. [illegible]

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IN THE SUPREME COURT OF THE STATE OF UTAH

QUAYLE CANNON, JR., and SHELDON R. BREWSTER, on behalf of themselves and other parties similarly situated,	:	
Plaintiffs and Respondents,	:	
-vs-	:	Case No. 16586
LEONARD W. McDONALD, in his original capacity as Executive Director of the Utah State Retirement Board, and the Utah State Retirement Board,	:	
Defendants and Appellants.	:	

NATURE OF THE CASE

This is an action requiring defendant-appellants to grant a legislative pension to plaintiffs-respondents.

DISPOSITION IN LOWER COURT

Judgment in favor of plaintiffs-respondents was granted by the Honorable James S. Sawaya.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment of the lower court.

STATEMENT OF THE FACTS

Respondents, Quayle Cannon, Jr. and Sheldon R. Brewster, having stipulated that they were (1) not in public service for 90 days during the period July 1, 1960 through June 30, 1961, and (2) did not, as a member of the Utah Public Employees Retirement System, render public service covered by the Retirement System during the period July 1, 1961 through June 30, 1962, nevertheless claim that they are entitled to a legislative pension for serving as legislators during the period 1941 through 1945, two sessions

of two years each, and in the case of Mr. Brewster, 1937 through 1943, three sessions of two years each, and also 1937 through 1960, two year sessions. The Respondents claim entitlement to a legislative pension under the law therefore, simply because they are prior legislators, without reference to "service" or any other qualifying requirements. The Retirement Board has denied the pension on the ground that the statutes establish qualifying standards which these Respondents do not, by stipulation, meet. The lower court found for the Respondents and ordered the payment of legislative pension to each.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN CONCLUDING THAT RESPONDENTS WERE ENTITLED TO A LEGISLATIVE PENSION SOLELY BECAUSE THEY HAD SERVED AS LEGISLATORS FOR FOUR (4) OR MORE YEARS ... THUS MISCONSTRUING THE RELEVANT STATUTES.

The facts in the matter on appeal here are not in dispute. A stipulation (T-70) was entered into this record at the time set for trial. Thus, the issue is purely one of law and this Court has historically reserved the right, as a matter of law, to substitute its own legal conclusion for those of the lower court without the general deference otherwise granted to the fact finders. It is respectfully submitted, that in this case the lower court has erred and misapprehended the law, thus placing in jeopardy the actuarial soundness of the whole Retirement System of the State of Utah, and each of the separate Funds administered by the Appellants. The plain meaning of the statutes is directly opposed to

the judgment. The sequence of events relative to the passage of 49-10-36 U.C.A. 1953, as amended, is important in clarifying the question here. These facts are all a matter of public record of which this Court may take judicial notice.

In 1961, the Utah State Legislature enacted the bill which, with various amendments, constitutes the current Public Employees Retirement System. At that date, no particular legislative pension system existed in Utah. However, both the members of the legislature and the Appellants interpreted the 1961 Act as including the members of that body and withholding of contributions actually were made and paid to the Retirement Board. The salary paid the legislators was minimal, the withholding minimal and the accruing pension benefit, thus minimal, at best. However, this 1961 Act established the basis for participation in the retirement system by legislators and has never been either amended or repealed, but indeed was carried over into the 1963 enactment of a bill which was then denominated in pertinent part as ". . . Establishing a Supplementary Retirement Pension for Legislators; . . . " HB 64, Laws of Utah, 1963. This bill did not purport to alter or amend in any way the threshold or qualifying terms of the 1961 enactment, but on the contrary, in Section 4 thereof provides:

> "ADDITIONAL RETIREMENT BENEFIT"
>
> "In addition to the retirement benefit provided by Section 49-1-57 of the Utah Public Employees Retirement Act, enacted by Chapter 100, Laws of Utah 1961, a pension shall be paid to a retired member who has credit for two or more years of service in the Utah Legislature . . ."
> (emphasis added)

The 1963 Law was passed two years after the original pension law which provided retirement benefits for legislators and other public employees, and which established the threshold or qualifying standards for all public employees--including legislators. It is respectfully urged that the emphasized language of the 1963 enactment is neither vague nor ambiguous, but refers clearly to a legislator member of the retirement system who has credit as established in 1961, two years previously. It is significant that all subsequent amendments to this Act required credit for four (4) years of service as a member, but neither the 1965, the 1967, 1971, nor the latest, the 1975 amendment have changed the language of qualification. Therefore, the 1961 Act established the threshold or qualifying standards for legislators. The 1963 and all subsequent acts merely created additional benefits without modifying standards. Those who had credit for the (2) years in 1963, following the 1961 enactment, had four (4) years in all subsequent legislative sessions.

The provisions of the 1961 Public Employees Retirement Act, dealing with eligibility, a threshold qualification of all public employees including legislators, gave credit for public service rendered prior to July 1, 1961 (the effective date of the Act) to all public employees and elected and appointed offices who were (1) "employed" on July 1, 1961 and (2) were employed in a covered unit between July 1, 1961 and June 30, 1962 if they had been employed for a minimum of 90 days between July 1, 1960 and June 30, 1961. [Section 3 (5) and Section 18 (1) (2), Chapter 100, Laws of Utah, 1961]. The Respondent stipulated (T-70) that they did not have the credit specified above.

Not only does the lower court's decision require pension payments to prior legislators who have made no contributions to the System, nor otherwise qualified as we have urged above, but there appears to be no rational basis for interpreting this decision as applying only to legislators, since the initial qualification was identical for all public employees, and, indeed, is the language used in all of the Retirement Systems administered by the appellants. (Public Safety; 49-11-17 through 20; Firemen; 49-6a-10 through 12; Judges, 49-7a-12 and 13). Thus, all former employees or public servants, firemen, public safety and Judges--without reference to "credit", appear to be entitled to a pension if the respondents are--and on the same grounds. It is obvious that the systems were set up actuarily to avoid this result and cannot remain solvent and actuarily sound if the basis of participation is thus judicially undermined contrary to legislative intent. Indeed, the retirement of all members of the various systems is then placed in jeopardy.

"Credit for Prior Service" and "Current Service Credit," "member", "Credit" and "Service", together with other similar words and phrases are special terms of art in retirement legislation. All such systems establish at the threshold, a point of entry or qualification which is essential to the actuarial soundness of the system. It is imperative that the legislature be able to calculate within close tolerance, the number of persons to be included, the source and amount of the contributions, the rate and conditions of pension payments, and the classes, if it is so structured, in order to establish a viable and actuarily sound public retirement system of any kind. To have the terms used to accomplish this end judicially interpreted in the common usage, rather than

in the intended terms of art is to frustrate the whole purpose and bankrupt the system. In view of the points to be made herein, it is submitted that the legislatures of this State have been fully conscious of their intended usage, the interpretation placed thereon by the Appellants, and have been satisfied with the results. Thus, we respectfully submit that the action of the lower court constitutes judicial legislation without the concomitant ability to fund or balance the results.

POINT II

THE LOWER COURT ERRED IN THAT IT VIOLATED ALMOST ALL ESTABLISHED RULES OF STATUTORY CONSTRUCTION

Respondents have sought to limit, or at least bottom their case on the 1971 Amendment (T-2). As heretofore noted, this is to ignore a series of enactments beginning with that of 1961 and culminating in the 1975 or most recent legislation dealing with the matter at issue. However, taking any particular amendment, such as the one of 1971, does not materially alter the result where established rules of statutory construction are adhered to. Each of these enactments use the terms of art heretofore alluded to--or some of them--in some form. The 1971 legislation is particularly instructive because it created for the first time a Governor's pension, as well as the Legislator Pension created in 1963. The distinction between subsections (1) and (2) of what is now, and since 1967 has been 49-10-36 U.C.A. 1953, as amended, are striking. The statute reads:

> (1) Upon reaching age 65 each former governor of the state of Utah shall be eligible, upon application to the retirement administrator, to receive for the remainder of his life a monthly pension of $500 per month if he has served one term or $1,000 per month if he has served two or more terms as

governor, provided that the payments under this lifetime pension shall be suspended for any period that a former governor holds an office of profit or trust, paying more than $100 per month under the government of the United States, state of Utah, or any political subdivision of the state.

(2) Upon reaching age 65, and upon application, a legislative pension shall be paid to a member who has credit for four or more years of service as a legislator in the Utah legislature, providing he is not normally employed full-time in a position covered by a Utah state administered retirement system. The pension shall be $10 per month for each year of service as a member of the legislature. If the retired member is elected to another term in the legislature or continues to serve in the legislature after reaching age 65, his legislative allowance, as herein provided, shall be suspended at the beginning of each session under regulations as established by the retirement board, but shall be restored at the same amount at the end of the session. Memberts receiving an allowance and serving as legislators shall be eligible for additional service credits and allowance adjustments at the end of each two-year term of office, coinciding with the term of a representative, providing they continue as contributing members during their service as legislators.

General rules of statutory construction require the complete reading of the statute and the giving of meaning, where possible, to each word and phrase. (Kennecott Copper Corp. v. Anderson, 514 P.2d 217, Maurice Grant v. Utah State Land Board, 405 P.2d 1035. It is for this reason that we think the historical background of the current legislation regarding legislators' pensions is important. It is of help in understanding the present legislation and the meaning intended in the usages of words and phrases therein. Further, it is to be presumed that the legislature uses intended language, words and phrases, and is not redundant Metropolitan Water District v. Salt Lake City, 380 P.2d 721--Maurice Grant v. Utah State Land Board, op cit.

In the drafting of the statute conferring a pension upon "each former Governor" [49-10-36 (1), U.C.A. 1953, as amended], the legislature demonstrated it knew how to accomplish the objective of eliminating any qualification except that of having occupied an office at some point in time. This statute is clear and unambiguous and goes surely and directly to the point. Thus, when in subsection (2) of the cited statute, the legislature retained the classical language of qualification common to all public pension plans and used since 1961 and 1963 in the public pension plans of Utah, the rule of construction which requires that meaning be given to all of the statute; the rule of construction that requires the same meaning in a revised statute of words and phrases carried over from the old (Security Life and Accident Co. v. Heckars, 495 P.2d 225); and the rule against redundancy in statutory construction, demands a different reading than that given to subsection (1), which the lower court failed to do. A common sense reading of these two subsections makes it clear that the legislature intended a different qualification standard for former governors and for former legislators. Read in light of the legislative history of legislator pension plans in Utah, this difference is marked and the intended standard clear. The use of the word "member" in the legislators provision [subsection (2)] can relate only to the retirement system--not the legislature, since reference is to both "member" and "serving as legislators" in the same sentence. Further, the use of the word "credit" and "service" are redundant and meaningless if the lower court's judgment is sustained.

Thus, it is urged that the rules of statutory construction heretofore established and adhered to by this Court were not applied to this case by the lower court and reversible error resulted.

POINT III

THE LEGISLATURE HAS CLEAR AUTHORITY TO ESTABLISH INITIAL QUALIFICATION STANDARDS IN PENSION LEGISLATION AND IT HAS DONE SO IN THIS CASE.

In a Memorandum (T-43) filed by Respondents in support of their judgment demand it is asserted that the legislature could not discriminate between former legislators and those actually admitted to a pension under the statute. It is not clear that the lower court reached this question in the Findings of Fact and Conclusion of Law (T-55), but the decision written by the Court was broad enough to do so, and we thus comment briefly on this question.

This Court has heretofore spoken on the question of qualification and line drawing when, in Hansen v. Public Employees Retirement System Board of Administration, 246 P.2d 591, it said:

> "No matter where the line is drawn, whether it be fifteen years, ten years, eight years, or any other place, the classification will undoubtedly seem harsh and unreasonable to those who have been excluded just below this line."

Thus, while it is not argued that the legislature could not have drafted the law differently and applied it as it so clearly did in the governor's pension provision, the legal power rests with the legislature to determine where it will draw the line and the courts should implement, not impede the clear legislative mandate once it has exercised its prerogative.

Further, in the recent case of Bryson, et al. v. Utah State Retirement Office, 573 P.2d 1280, this Court once again affirmed the authority and propriety of the legislature in establishing standards and making distinctions among the various systems. Thus, the legislative mandate is clear and the courts ought not to interfere simply because, were the option theirs, they would draw the line elsewhere. In view of the well-established law of this jurisdiction, the courts should not substitute their judgment for that of the legislature, particularly in cases such as this where the funding and actuarial soundness of the whole system which the legislature has carefully considered and balanced may thus be upset and destroyed. If "credits", "service", and "member" are so easily ignored and written out of the law by judicial fiat in legislative pensions, how do we deal with the same pension terms of art in all the other retirement systems? This is particularly so because the several legislatures never sought to alter or amend the qualifications for membership in the system established for all public employees in 1961.

POINT IV

THE DOCTRINES OF ADMINISTRATIVE INTERPRETATION AND CONTEMPORANEOUS CONSTRUCTION REQUIRE A REVERSAL OF THE JUDGMENT OF THE LOWER COURT.

We believe, as heretofore noted in this brief, that the language of the statutes is clear and unambiguous. However, in view of the position taken by the Respondents and the judgment of the lower court, we believe the doctrines alluded to in this point must be given consideration. It is well-established that "(w)hile construction of a statute by the administrative is not binding on the courts, ... if such construction is not

out of harmony with the apparent intent, the administrative interpretation will be given some weight in applying the statutes to controversies that arise thereunder." (State of Utah v. James L. Hatch and Della L. Hatch, 342 P.2d, 1103, and case cited therein). In the cited case, this Court cites with approval a prior statement of the Court that the legislature is presumed to know the construction placed upon the language of the statutes by the administering agency, and continued inaction on the part of the legislature to alter or amend it, constitute affirmative approval. In this context, it is significant to observe that an attempt has been made in three legislative sessions to amend the language of the statute in question to accomplish the objective sought by the Respondents in this litigation. In 1975 a bill was prepared to provide a pension to "any former member of the Utah Legislature ..." (T-32). No sponsor was obtained and the bill was never introduced. In 1977, Senate Bill 314 (T-34) was sponsored by Warren E. Pugh and Ivan M. Matheson "... clarifying the Basis of Service of Legislators for their Retirement Pension." This Bill died in the Senate Sifting Committee. A bill was introduced in the last legislative session (1979) to accomplish the same objective and was not passed. (S.B. 83 which passed in the Senate and died in the House.)

In view of this record the Doctrine of Administrative Interpretation, if it is to have more than lip service, must be given substantial weight in favor of the Appellants in this case. This becomes particularly so when we consider it in the light of the Doctrine of Contemporaneous Construction.

One of the Respondents herein filed a claim for a legislative pension in or about 1972 or 1973. Subsequent thereto, the then Executive

Director of the Utah State Retirement Board, Leonard W. McDonald, requested an opinion of Attorney General's office on the validity of this claim. Under date of April 6, 1973 a Formal Opinion (No. 73-007) of that office was prepared by Roger K. Bean and submitted to Mr. McDonald. That Opinion (T-37) held that the claim was not payable under the then existing (and now in pertinent part unamended) legislation.

In the case of State v. Alta Club, et al., 232 P.2d 759, this Court acknowledged and used the Doctrine of Contemporaneous Construction. The issue there was the legality of locker clubs under the existing law. After discovering a series of legislative investigation and attorney general opinions--both written and apparently oral, over a period of years, and dealing with an argument that the Doctrine of Contemporaneous Construction did not apply because the statute was clear and unambiguous, the Court said:

> "It seems abundantly clear that the several legislatures, to the attention of which this locker system was called, did not remain inactive because they believed such system was clearly interdicted under the present law, inasmuch as they were advised to the contrary by the chief law enforcement officer of the State."

Similarly, the several legislatures to which the administrative interpretation and the Attorney General's Opinion were known in this case, did not alter or amend the law. Indeed, they affirmatively refused to do so--although they were aware of the interpretation thereof by the chief law enforcement office of the State.

We respectfully submit, therefore, that the doctrines of administration interpretation and contemporaneous construction strongly

militate against the judgment of the lower court and thus, reversible error was committed which this Court should redress.

It should be noted that compliance with the judgment of the lower court would not be in compliance with the law, in any event, since the $10 per month for each year of service is not the present law. We allude to this because we think it illustrates that neither the Respondents nor the lower court have understood retirement legislation generally nor the legislative pension provisions specifically (T-61). Further, we note that the lower court, after finding the action was not certified as a class action and, therefore, is not deemed to be so, but is limited to the two named plaintiffs (T-56), proceeds to conclude (T-58) that "Each former Utah Legislator" is entitled to a Pension, and further declares in its judgment (T-61) that "every former Utah Legislator" is so entitled.

CONCLUSION

It is urged that a common sense reading of the several statutes involved in this litigation, when the proper rules of statutory construction are applied, and the established doctrines of administrative interpretation and contemporaneous construction are considered, leave no doubt, either as to the existence of qualifying standards for legislators' pension which the Respondents do not meet, or the intent of the several state legislatures that such standards be applied to them. Further, we submit that the authority within both constitutional and other legal parameters does exist in the legislature to make such determination. Further, when

the difficulty of "reading out" these qualifying standards is considered in light of all the other pension systems--Public, Public Safety, Firem and Judges'--and the consequences to the Public Employees System and the accrued rights of included and funded employees of all of these Systems are given perspective, we strongly urge this Court to sustain the positi of Appellants by reversing the judgment of the lower court and ordering judgment for the Appellants.

Dated this 28th day of September, 1979.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief to NEAL CHRISTIANSEN, Kirton, McConkie, Boyer & Doyle, Attorneys for Respondent, 330 South 300 East, Salt Lake City, Utah 84102 this 28th day of September, 1979.

Mark A. Madsen